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IN THE

Supreme Court of the United States

October Term, 1955.
No. 314

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Petitioners,

vs.

UNITED STATES OF AMERICA and LEE ARENAS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
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Petitioners.

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JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Petitioners,

vs.

UNITED STATES OF AMERICA and LEE ARENAS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above-entitled case on May 21, 1956.

Opinions Below.

The District Court wrote no opinion. The opinion of the United States Court of Appeals, printed in Appendix A hereto, is reported in 232 F. 2d 77.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 23, 1956. [R. .....; p. ....., *infra.*] Rehearing was denied on May 21, 1956. [R. .....] The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254(1).

Question Presented.

The principal question involved herein is whether the District Court, in the exercise of its equity jurisdiction under the Act of August 15, 1894 (28 Stat. 305, as amended; 25 U. S. C. A., Sec. 345), had power to allow interest on the judgment for attorneys' fees and expenses of suit as damages for delay in payment.

Statute Involved.

The statutory provisions involved are contained in 25 U. S. C. A., Sec. 345, as follows:

> "All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) * * *"

Statement.

This petition for a writ of certiorari stems from and is part of the litigation entitled *Lee Arenas, Plaintiff, vs. United States of America, Defendant.* The action was brought in the District Court of the United States for the Southern District of California by Lee Arenas under 25 U. S. C. A., Sec. 345, *supra,* to secure an allotment of land in severalty from the reservation of the Agua Caliente (or Palm Springs) Band of Mission Indians situated in Riverside County, California. The petitioners were the attorneys for Lee Arenas from the inception of said case until judgment was entered in his favor (*Arenas v. United States,* 60 Fed. Supp. 411) and until after the judgment of the District Court was affirmed by the Circuit Court of Appeals (*United States v. Arenas,* 158 F. 2d 730), certiorari denied by this Court, 331 U. S. 842, on June 9, 1947.

Upon remand of the case to the District Court petitioners filed therein their petition for allowance of attorneys' fees and expenses of suit, and for an equitable lien on the allotted lands of Arenas. The District Court awarded fees on a percentage basis, the United States and Arenas appealed, and the Court of Appeals affirmed as to petitioners' right to fees and expenses of suit and to an equitable lien but reversed as to percentage fees, directing that the District Court determine the money value of petitioners' legal services. (*Arenas v. Preston,* 181 F. 2d 62.) The United States and Arenas filed petition for certiorari, which was denied by this Court on October 9, 1950. (340 U. S. 819.) On remand, the District Court awarded attorneys' fees to petitioners in the amount of $90,000 and expenses of suit in the amount of $258.67; the United States and

Arenas again appealed, and the Court of Appeals affirmed. (*United States v. Preston*, 202 F. 2d 740.) Upon remand, petitioners moved for an order of sale of a sufficient amount of the Arenas lands necessary to satisfy said judgment, and that interest at 7% per annum, from a date six months subsequent to the entry of the judgment, be added to the principal amount thereof. The order of sale so provided. The United States moved to delete the words "together with lawful interest thereon at the rate of 7% per annum from April 6, 1951." [R. 15.] The District Court, on October 26, 1953, modified its original order of sale to provide that, *inter alia*, the proceeds of sale be paid: "* * * (2) to the petitioners John W. Preston, Oliver O. Clark and David D. Sallee, the amount of Ninety Thousand Two Hundred Fifty-eight and 67/100 Dollars ($90,258.67), together with lawful interest thereon at the rate of seven per cent (7%) per annum from October 6, 1951 * * *". [R. 18, 19.] No appeal was taken from said order. Thereafter, by stipulation of all parties, Lee Arenas sold portions of his allotted lands and the net proceeds thereof aggregating $122,114.00 were deposited in the registry of the District Court and the lien of the judgment was transferred to said deposited funds by stipulation of the parties and by order of the court. Upon petition of John W. Preston [R. 46-53], order to show cause [R. 57-61], and findings of fact and conclusions of law [R. 61-72] the District Court, on August 21, 1954, ordered distribution of the amount of said judgment and the interest thereon from October 6, 1951,

to petitioners and/or their assignees. [R. 73-78.] The United States and Lee Arenas appealed from those portions of the judgment "awarding and allowing * * * interest from and after October 6, 1951." [R. 79-80; also, R. 83-84.] The Court of Appeals reversed the portions of the judgment awarding interest. (See Appendix A.)

It is important to note that in the judgment and supplemental decree of the District Court awarding attorneys fees and expenses of suit to the petitioners said Court provided:

> "The Court hereby retains its jurisdiction over this action and the parties thereto and the subject matter thereof, in order to act upon and determine the time, or times, when and the manner in which, and the method, or methods, whereby said allotted lands shall be sold and the payment of the compensation and expenses of suit hereby awarded to said petitioners shall be made to them, and in order to require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded to the petitioners, and in order to make and confirm a sale of said lands of the plaintiff, and to make distribution of the proceeds of said sale to the parties thereto as hereinabove provided, and in order to fully enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this court." [R. 7-8.]

Similar reservations or retentions of jurisdiction over the parties and subject matter of this action were made in subsequent orders of the District Court relating to

sales of the Arenas lands and to the distribution of the proceeds thereof. [See Order of Sale etc., R. 14; Order for Readvertisement, R. 24; Judgment for distribution of funds in registry of District Court, R. 77-78.] In addition, other orders of the court expressly retained the equitable lien awarded petitioners on lands or proceeds of sale thereof. [See Order, R. 31; Stipulation and Order, R. 35; Order R. 37-38; Stipulation and Order, R. 40-41; Order, R. 43; Conclusions of Law, R. 72.]

Reasons for Granting the Writ.

1. The decision of the court below in the instant case, holding that the District Court was without jurisdiction to award interest on a judgment in a case in which the United States is a party but is not liable for the claim against Lee Arenas, is directly in conflict with decisions of this Court holding that when a suit is against the United States but no debt or claim is asserted against it, but is asserted against other parties to the suit, the rule of sovereign immunity from liability for interest does not apply.

Miller v. Robertson, 266 U. S. 243, 256-258;

Banco Mexicano v. Deutsche Bank, 263 U. S. 591, 603.

Cf.

National Home v. Parrish, 229 U. S. 494;

Standard Oil Co. v. United States, 267 U. S. 76, 79;

United States v. North American Transportation etc. Co., 253 U. S. 330, 336;

United States v. Creek Nation, 295 U. S. 103, 113;

Seaboard etc. Ry. Co. v. United States, 261 U. S. 299.

2. The decision of the court below is in direct conflict with the decisions of this Court, holding that in equity interest may be allowed on a claim as a means of compensating a creditor for loss of the use of his money.

Miller v. Robertson, 266 U. S. 243, *supra;*

Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. Ed. 752;

Young v. Godbe, 82 U. S. 562, 21 L. Ed. 250;

Curtis v. Innerarity, 6 How. 146, 12 L. Ed. 380;

Spalding v. Mason, 161 U. S. 375, 396.

Also,

United States v. United Drill etc. Corp., 183 F. 2d 998;

Abell v. Anderson, 148 F. 2d 372, 375;

Seaboard Surety Co. v. Spear, 119 F. 2d 849, 852.

The jurisdiction conferred upon the district courts by 25 U. S. C. A., Sec. 345 is equitable.

See:

Arenas v. Preston, 181 F. 2d 62, cert. den. 340 U. S. 819.

Cf.

United States v. Equitable Trust Co., 283 U. S. 738.

3. The decision of the court below is in direct conflict with the rule that "when necessary in order to arrive at fair compensation, the Court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." (*Miller v. Robertson*, 266 U. S. 243, 258.)

Also,

Concordia Ins. Co. v. School Dist., 282 U. S. 545, 554-555;

Standard Oil Co. v. United States, 267 U. S. 76, 79;

De La Rama v. De La Rama, 241 U. S. 154, 159-160;

The Paquette Habana, 189 U. S. 453, 467;

Eddy v. LaFayette, 163 U. S. 456, 467.

The District Court, in the exercise of its sound discretion, allowed interest on the judgment. The Court of Appeals erred in reversing the District Court's order allowing interest.

4. The decision of the court below is in conflict with the rule in equity that interest is given in response to considerations of fairness and is denied when its exaction would be inequitable.

Board of Comrs. v. United States, 308 U. S. 343, 352;

Billings v. United States, 232 U. S. 261;

United States v. Sanborn, 135 U. S. 271.

In the case at bar judgment awarding attorneys' fees and expenses of suit to petitioners was entered on April 6, 1951 [R. 3-8], and Arenas was given six months in which to pay the judgment. Both he and the United States appealed, and the judgment was affirmed. (*United States v. Preston*, 202 F. 2d 740.) The principal amount of said judgment was not paid until after order of distribution entered August 23, 1954. It would be grossly inequitable not to allow interest for the delay period of more than three years. The amount of the interest

for said period was ordered retained and is now in the registry of the District Court, and may be paid to petitioners without prejudice to the rights of third persons.

5. The decision of the court below, reversing the order of the District Court allowing interest on the judgment for attorneys' fees and expenses of suit, is contrary to the rule that where a court of equity has jurisdiction of the principal case it will completely dispose of its incidents and put an end to further litigation.

Pease v. Rathbun-Jones Engineering Co., 243 U. S 273;

Brame v. Keystone Credit Corp., 76 F. 2d 328, cert. den. 296 U. S. 591;

Taylor v. Spurway, 72 F. 2d 97;

Greer Inv. Co. v. Booth, 62 F. 2d 321.

Moreover, the decision of the court below is in conflict with its prior decision in this case (*Arenas v. Preston*, 181 F. 2d 62), where the court said, *Id.* pp. 65, 66;

> "We come to the question: Does the equity jurisdiction of federal courts under the Act of 1894 (*i.e.*, 25 U. S. C. A. sec. 345) invoke all equitable processes and hence permit the application of rules '* * * which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* * * *?' United States v. Equitable Trust Co., 1931, 283 U. S. 738 * * *
>
> "Appellant United States in the instant case makes practically the same argument as it made in the Equitable case. That is, that the court cannot apply the general rule, to wit: That a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case do not specifically authorize it" * * * (*Id.* p. 66.)

> "It seems to us that Congress could not have intended to commit the subject to its courts with any paralyzing limitation but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction." (*Id.* pp. 66-67.)

The decision below, if allowed to stand, would certainly place the "paralyzing limitation" mentioned, *supra*, upon the exercise of their general equity jurisdiction by the federal district courts, since it would tend to split such general equity jurisdiction into parts less than the whole and thereby prevent application of the rules that "equity delights to do justice, and that not by halves" and that "when equity once acquires jurisdiction it will retain it so as to afford complete relief." (21 C. J. 198.)

See, also:

80 C. J. S. 506, and cases cited in notes 39, 40;
Camp v. Boyd, 229 U. S. 530;
Shaffer v. Carter, 252 U. S. 37;
Roadway Express v. Murray, 60 F. 2d 293.

The District Court in the exercise of its general equity jurisdiction awarded "complete relief" to petitioners by its judgment allowing interest. The Court of Appeals, by disallowing interest, has thereby denied complete relief to petitioners.

6. The decision of the court below is contrary to the rule that, in order to redeem his lands from the equitable lien awarded to petitioners to secure payment of the judgment for attorneys' fees and expenses of suit, Lee Arenas was required to pay the judgment and also damages for delay.

Cal. Civ. Code, Secs. 2905, 2912;
16 Cal. Jur. 324, 347;

San Pedro Lbr. Co. v. Reynolds, 121 Cal. 74;
Loughborough v. McNevin, 74 Cal. 250.

The partial payment of the judgment, secured by the equitable lien, was insufficient to extinguish the lien.

Cal. Civ. Code, Sec. 2912;
Van Dorn v. Couch, 21 Cal. App. 2d 749.

The statutes are controlling. Section 2905 of the California Civil Code, *supra*, provides:

> "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay."

Section 2912 of the California Civil Code provides:

> "The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible."

The money proceeds of the sales of portions of the lands of Lee Arenas were, by stipulation of all parties to the litigation including the United States, paid into the registry of the District Court. The lien of the judgment on the lands thus sold was transferred to said deposited funds, and the lands sold were released from said lien. This amounted to a redemption of the lands of Arenas from the lien of said judgment for fees and expenses with interest, and petitioners were authorized and required thereby to look to the funds deposited in the registry of the court for the satisfaction of the judgment. The lien was not and could not be discharged as to said funds until the principal amount of the judgment and damages for delay were fully paid.

Cal. Civ. Code, Secs. 2905, 1504;

16 Cal. Jur. 347 *et seq.;*

Golden State etc. Co. v. Ward Motor Co., 185 Cal. 402;

Leet v. Alexander, 143 Cal. 663;

Nelson v. Younger, 73 Cal. 704.

7. The decision of the court below is contrary to the rule that where no appeal is taken from a final order or judgment, such order or judgment is *res judicata.* The order allowing interest on the judgment for fees was entered on November 10, 1953, was not appealed from and was final, and the United States and Lee Arenas are estopped to question the validity thereof.

Partmar Corp. v. Paramount Pictures, 347 U. S. 89, 98;

United States v. Munsingwear, Inc., 340 U. S. 36;

C.I.R. v. Sunnen, 333 U. S. 591;

Southern Pacific Co. v. United States, 168 U. S. 1.

The rule of *res judicata* is particularly applicable to the order allowing interest in question. After the order was first made and entered on August 7, 1953 [R. 8-14], the United States moved to modify the same "by deleting therefrom the language: 'together with lawful interest at the rate of 7% per annum from April 6, 1951.'" [R. 15.] The District Court denied the motion but modified its original order to provide that interest run from October 6, 1951, instead of from April 6, 1951. [R. 18-19.] No appeal was ever taken from those orders, or either of them. *Res judicata* therefore applies.

8. The decision of the court below is not only in conflict with its former decision (*Arenas v. Preston,* 181

F. 2d 62), but it restricts and takes away to a large degree the equity powers of the District Court.

In its former decision (*Arenas v. Preston*, 181 F. 2d 62) the Court of Appeals expressly held that the District Courts had the power "to fully exercise their general equitable jurisdiction" in cases that come within the jurisdictional Act of 1894 (25 U. S. C. A., Sec. 345), including the settlement of "incidental questions as well as fundamental questions" even though the "applicable statutes in this case do not specifically authorize it." (*Id.* pp. 66-67.) The Court held that "incidental questions" included the allowance of attorneys' fees and the award of an equitable lien to secure payment thereof, and the Court expressly retained its jurisdiction "in order to fully effectuate and enforce the supplemental decree (for fees, etc.) herein in accordance with the equitable jurisdiction, practice and procedure of this court." [R. 3-8.] The equity jurisdiction conferred by 25 U. S. C. A., Sec. 345 was not exhausted, surrendered, or diminished by any order, judgment, or decree, entered in the case, but was expressly retained so that the Court might "require and compel the enforcement, satisfaction and discharge of the equitable lien herein and hereby awarded * * * and in order to fully effectuate and enforce the judgment and supplemental decree * * *." (*Id.*) We think the equity jurisdiction of the District Court included the incidental question of interest on the judgment, as well as the other incidents of the litigation.

It may also be noted in this connection that the decision of the court below, denying interest on the judgment for fees, is not in the best interest of Indians who are compelled to sue the United States in order to secure or to preserve their allotments in severalty, nor in the

best interests of their attorneys. In order to secure or preserve his right to an allotment an Indian must employ private counsel since "the Indian by himself was incapable of taking advantage of the privilege" of suing under 25 U. S. C. A., Sec. 345, and "attorney fees and other expenses would be the unavoidable concomitant." (*Arenas v. Preston*, 181 F. 2d 62, 66.)

It is doubtful whether any lawyer would have accepted employment in the Lee Arenas case if he could have foreseen the obstructing and delaying tactics of the Government in the case. The litigation began in 1940. Final judgment for Arenas was entered on May 14, 1945, but appeals and petitions for certiorari to this Court delayed enforcement of the judgment until after June 9, 1947, when this Court denied certiorari. Petitioners filed their petition for fees on October 24, 1947, but delays caused by the Government's appeals and other like tactics postponed final judicial action on the fee question until March 16, 1953. Further delays were requested by Arenas, so that he might sell portions of his land without loss or sacrifice, and these delays were granted by petitioners. [R. 20-44.] The Government joined in Arenas' requests. It was not until August 23, 1954, that the District Court entered its order to disburse to petitioners the amount awarded for fees and expenses, and the Government again appealed as to the interest allowed on the judgment. Fourteen years of litigation without one dollar of compensation or reimbursement of expenses, and more than three years of delay after their right thereto has been adjudged, should be sufficient basis in equity, if any is needed, for an award of interest on the judgment. The District Court in the exercise of its sound discretion in equity allowed interest, and its award should not have been reversed.

This Court has held in many cases where the United States was a party that the trial court "in the exercise of a sound discretion may include interest or its equivalent as an element of damages." (*Miller v. Robertson,* 266 U. S. 243, 258.) See other cases cited under Reason 3 for granting the writ, *supra.* In *Royal Indemnity Co. v. United States,* 313 U. S. 289, 296, this Court said:

> "In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due. (Citing cases.) * * *"

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court to the United States Court of Appeals for the Ninth Circuit, to the end that the judgment of said United States Court of Appeals herein complained of may be reviewed by this Honorable Court.

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
Petitioners,

By JOHN W. PRESTON,
Counsel for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals.

United States of America and Lee Arenas, Appellants, v. John W. Preston, Oliver O. Clark, and David D. Sallee, Appellees.

Lee Arenas, Appellant, v. John W. Preston, Oliver O. Clark, and David D. Sallee, Appellees. No. 14555.

United States Court of Appeals, Ninth Circuit. Feb. 23, 1956.

Rehearing Denied May 21, 1956.

Action by Indian to have determined his right to allotment of certain land situated in reservation. After the allotment had been made, the District Court, William C. Mathes, J., entered order directing distribution of interest on sum fixed as attorney's fees to Indian's attorney from fund in court representing proceeds of land sold under stipulation of parties. The Indian and the United States appealed. The Court of Appeals, Stephens, Circuit Judge, held that interest on such attorney's fees could not be imposed against sum representing restricted Indian land, but that trial court had not committed abuse of discretion in allowing attorney lien on proceeds of land recovered through his efforts for expenses incurred by him in prior suit which was in reality part of allocation proceeding.

Reversed in part, affirmed in part.

Perry W. Morton, Asst. Atty. Gen., John F. Cotter, Edmund B. Clark, Roger P. Marquis and John C. Harrington, Attys., Dept. of Justice, Washington, D. C., Laughlin E. Waters, U. S. Atty., Los Angeles, Cal., for appellant United States.

Irl Davis Brett, Los Angeles, Cal., for appellant Lee Arenas.

John W. Preston, Los Angeles, Cal., Oliver O. Clark, La Canada, Cal., David D. Sallee, Santa Monica, Cal., for appellees.

Before Stephens and Chambers, Circuit Judges, and Taylor, District Judge.

Stephens, Circuit Judge.

The United States in its appeal accurately states the two ultimate issues in the following language:

"1. Whether interest on attorney's fees may be imposed against a fund in court which represents restricted Indian land.

"2. Whether an attorney's lien on the proceeds of land recovered through his efforts in one suit includes expenses incurred in another suit."

In addition to the issues mentioned, there is a question as to the effectiveness of the appeal.

In Arenas v. Preston, 9 Cir., 1950, 181 F. 2d 62, this court, upon appeal, approved the impressment of a lien on the Indian's allotment of land for the attorney fees and cash advanced for costs by attorneys for the Indian. However, we remanded the case to the district court with instruction to ascertain and fix the reasonable sum for attorney fees instead of fixing the fees upon a contract which had been entered into between Lee Arenas and the attorneys. The district court complied with the conditions of the remand in a judgment and supplemental decree entered April 6, 1951. The district court's decree was silent as to the interest on the sums so fixed. The decree did, however, provide:

"Fourth. That the plaintiff Lee Arenas, be and he is hereby allowed a period of six (6) months from and after the date of the entry of the judgment and supplemental decree herein within which to pay the compensation and expenses of suit awarded to the petitioners, * * *."

It then provided in the next paragraph for the public sale of the lands and for the payment out of the proceeds of the sums referred to, together with expenses, and payment of the balance to the United States in trust for the plaintiff.[1] In the next paragraph of the decree the court provided for its own retention of jurisdiction to confirm any sale of the lands, distribute funds received from the sale, and generally—

"* * * in order to fully effectuate and enforce the judgment and supplemental decree herein in accordance with the equitable jurisdiction, practice and procedure of this [district] court."

No payment was made upon the judgment within the six-month period, but many months thereafter the attorneys filed a petition with the district court requesting a sale of the property under the judgment which petition was granted and the order provided that a commissioner should sell sufficient lands to pay expenses of the sale, the attorney fees and costs, and for the first time in the litigation, the interest thereon was mentioned as follows:

"* * * together with the lawful interest thereon at the rate of 7% per annum from April 6, 1951, [the

[1]We said in the cited case, Arenas v. Preston, 9 Cir., 1950, 181 F. 2d 62, at page 67: "The interest of the United States in the allotment will not cease to exist until the 'trust patent' to the property is ripened into an unqualified patent to it and the impressment of a lien for an excessive fee would illegally and inequitably affect such interest."